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No. 06-975

IN THE

Supreme Court of the United States

JAMES A. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF

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REPLY BRIEF OF PETITIONER

In the second federal prosecution brought in the wake of Enron's collapse, petitioner was convicted by a Houston jury of lying to the grand jury by supposedly "stating that he did not know of any oral promise between Enron and Merrill Lynch relating to the barge transaction." Indictment ¶ 18; Pet. App. 26a n.14.[1] But the prosecutor who took petitioner's grand jury testimony never asked about an "oral" promise. To the contrary, petitioner's own words and the documents used to frame the prosecutor's questions make clear that petitioner's denials of knowledge about an "obligation" or "promise" refer not to any separate oral promise, but to the terms of the documented "transaction" itself. Pet. 24-28. And all agree that the transaction documents contained no promises of the sort referenced in the indictment. *Id.* at 3-4; Pet. App. 44a-45a (DeMoss, J., dissenting). Petitioner's conviction thus rests on statements that were either literally true—because they were accurate descriptions of the undisputed terms of the transaction—or, if they could conceivably also be read (as the government argues) as denials of a corrupt oral side agreement, fundamentally ambiguous as between the two alternative proffered meanings.

The petition demonstrates how the doctrines of literal truth and fundamental ambiguity, as one or both are applied in virtually every circuit, constrain the prosecutor's power to pursue charges of perjury in circumstances like these by requiring courts to conduct *de novo* review of the meaning of the testimony at issue. Pet. 12-23. Had the court below

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[1] The "oral" character of this supposed promise was critical because the government's theory of fraud was that Enron had entered into a transaction with Merrill Lynch that was documented as an outright sale, but was in fact a sham due to an unconditional oral promise by Enron to buy back the barge interest within six months. *See* Pet. 6-7.

followed the law of these other circuits, the outcome in petitioner's case would have been different. *See id.* at 24-29. But, as the government confirms in its brief in opposition, the court below expressly stated that it would not perform such plenary review, even though—as the government also concedes—petitioner specifically asked that it do so. Opp. 6.

Notwithstanding this state of affairs, the government urges this Court to deny certiorari. It justifies that view through a series of surprising contentions—that petitioner failed below to make arguments that appear plainly and repeatedly in his briefs, and that the court below "seemingly" applied *de novo* review despite its explicit refusal to do so.[2]

I. Petitioner's Claim That His Testimony Was Literally True Was Raised Below and Directly Implicates the Circuit Conflict on Whether *Bronston*'s Literal Truth Defense Applies in the Context of Responsive Statements

The petition shows that a circuit conflict has developed as to whether the legal defense of literal truth recognized in *Bronston* applies in every instance of a literally true though arguably misleading statement, or whether the defense applies only where, as in *Bronston*, the testimony's misleading quality results from the fact that it is non-responsive to the question asked. Pet. 15-19.[3] The government neither admits nor denies the existence of this conflict. Instead, it contends that *Bronston* applies only

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[2] The government does not dispute, and thus apparently concedes, that (1) petitioner's convictions for perjury and obstruction of justice both stand or fall together, since both rest on the same three allegedly "false and misleading" statements, *see* Pet. 14 n.11; and (2) reversal is required if the Court finds that any one of the three allegedly false statements is legally insufficient to support a perjury conviction, *see id.* at 27 n.18.

[3] The Fifth Circuit has long followed the latter view. *See United States v. Cuesta*, 597 F.2d 903, 920 (5th Cir. 1979).

where there is "no *factual* dispute" concerning the testimony, and that factual disputes about truth are always for the jury to resolve. Opp. 9. This leads the government to observe that "petitioner cites no authority for the proposition that . . . *all* claims concerning the truth of statements are legal claims subject to de novo review." *Id.* at 10.

But the government misconstrues both petitioner's argument and the case law since *Bronston*. Nobody denies that disputes about underlying *historical* facts (such as, in this case, the contested issue whether Enron had in fact made an oral guarantee) are generally for the jury to resolve. But this case also involves an *interpretive* dispute about the meaning of petitioner's testimony—was that testimony simply describing the documented terms of the transaction, in which event petitioner's statements were undisputedly accurate? The literal truth defense, if applicable, requires the court to address this question *de novo*. *See, e.g.*, *United States v. Shotts*, 145 F.3d 1289, 1298-99 (11th Cir. 1998). It is this *interpretive* issue, focused on the meaning of the grand jury colloquy, that implicates the circuit conflict on whether *Bronston's* literal truth defense extends to responsive answers. *See* Pet. 15-19.

The government also argues that petitioner did not properly assert the legal defense of literal truth below. It suggests that, rather than denying the availability of plenary review for a proper claim of literal truth, the circuit court was merely describing what it saw before it: a sufficiency of the evidence challenge. Opp. 10-11. This is nonsense. Petitioner's appellate briefs repeatedly referenced the "literal truth" defense and the *Bronston* holding, *see* Opening Br. 61, 63, 66, 69, 73; Reply Br. 41, 43, 45, 46, 50, 52, and were explicit in claiming that *de novo* review was required, *see e.g.*, Reply Br. 41-42 n.42 (citing numerous cases outside the Fifth Circuit requiring plenary review of literal truth claims). Indeed, the court below recognized that petitioner asserted a right to *de novo* review in connection with his literal truth claim, and expressly rejected it. Pet. App. 29a n.16. The

court then stated categorically that its review would focus only on "whether a rational trier of fact could have found that the evidence established the elements . . . beyond a reasonable doubt." *Id.* at 29a-30a.

The government next reverses course and argues that, even though it was not obligated to do so, the court below "seemingly" gave plenary consideration to the literal truth defense. Opp. 14. It claims that was done in a paragraph of the opinion referencing petitioner's contention that "his testimony was not actually false." *Id.* at 13-14. But that single short paragraph upon which the government relies as providing supposed *de novo* review, *see* Pet. App. 31a, is bracketed by sentences—*at the beginning and end of the paragraph*—stating that "[b]ased on this proof, a reasonable jury could have found that the evidence was sufficient to conclude . . . that Brown's answers . . . were untruthful." *Id.* at 31a-32a. Plainly, the court was doing what it said it would do—reviewing only for sufficiency of the evidence.[4]

Thus, without doubt, the court below refused to provide plenary consideration of petitioner's literal truth argument. This refusal directly implicates the circuit split demonstrated in the petition, Pet. 15-19, and affected the outcome of this

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[4] In support of its argument that *de novo* review was provided on the literal truth defense, the United States (Opp. at 14) points to the court's statement that petitioner's "distinction and spin placed on selective and hypertechnical word choice provides no refuge from the jury's verdict." Pet. App. 31a. Far from showing that the court of appeals applied *de novo* review, this statement demonstrates that the court rejected any such gatekeeper role for itself. For what the Fifth Circuit derisively describes as a "hypertechnical" parsing of language is *precisely* the searching *de novo* inquiry that petitioner contends, and other circuits hold, is the required response to a defendant's claim of literal truth. *See, e.g.*, *Shotts*, 145 F.3d at 1299 (denial of prior ownership literally true because stock formally held in wife's name); *United States v. Earp*, 812 F.2d 917, 919 (4th Cir. 1987) (denial of prior cross burning literally true because prior effort was unsuccessful attempt).

case, *id.* at 25-28. The Court should accordingly grant certiorari in order to resolve that conflict.

II. The Government Concedes That the Court Below Was Required To Consider *De Novo* Petitioner's Defense of Fundamental Ambiguity, and the Court's Own Words Establish Beyond All Doubt That It Did Not Do So

As to the doctrine of fundamental ambiguity, the government acknowledges that the courts of appeals have generally recognized that "a prosecution for perjury is foreclosed as a matter of law where the question at issue was 'fundamentally ambiguous': that is, where the question was 'so ambiguous that it is not amenable to jury interpretation.'" Opp. 14. Its only defense of the analysis of the court below is to assert that the Fifth Circuit in fact provided just such *de novo* review here. It did not.

The opinion below directly contradicts the government's position. In his briefs below, petitioner relied repeatedly upon the fundamental ambiguity defense and on the principle, derived from *Bronston,* that insufficient specificity in questioning requires reversal as a matter of law. *See, e.g.*, Opening Br. 66-67, 69 & n.60, 70. He expressly asserted that *de novo* review of such contentions is required, and provided extensive extra-circuit authority to support it. *See, e.g.*, Reply Br. 42 n.42.

In response, the court below expressly held that petitioner's assertion that "the questions posed to him before the grand jury were too 'vague and ambiguous' to support a perjury conviction" "is properly characterized as an attack on the sufficiency of the evidence." Pet. App. 29a. In so holding, the court emphasized that petitioner had "mischaracterize[d]" his claim "as a legal sufficiency challenge, which we would review *de novo*. It is clear, however, that Brown's challenge is to the sufficiency of the evidence." *Id.* at 29a n.16.

Indeed, the Fifth Circuit had previously held, even more directly, that challenges to a question's ambiguity are reviewed for evidentiary sufficiency "[e]ven if the term [at issue] was . . . 'fundamentally ambiguous.'" *United States v. Parasiris*, 85 F. App'x 380, 381 (5th Cir. 2004) (per curiam); *see also id.* (rejecting "extra-circuit law" on fundamental ambiguity). The government dismisses *Parasiris* as an unpublished decision with no precedential effect, Opp. 16 n.5, but the holding in *Parasiris* dispels any doubt that the Fifth Circuit in *this* case meant what it said when it held that petitioner's claim of fundamental ambiguity "is properly characterized as an attack on the sufficiency of the evidence." Pet. App. 29a. Indeed, the fact that *Parasiris* is unpublished suggests that this rule is settled law in the Fifth Circuit. *See* 5th Cir. R. 47.5.1 (providing that opinions should not be published where they "merely decide particular cases on the basis of well-settled principles of law"); *see also Cuesta*, 597 F.2d at 920 (whether testimony was "ambiguous" is "a decision for the jury").

Moreover, it was the government that urged the court below to apply the sufficiency standard. In its brief, it asserted that "none of [petitioner's] claims"—including his claim that "'the government's vague, ambiguous questions are legally infirm'"—"is reviewed *de novo*. Rather, each is simply a sufficiency-of-the-evidence challenge to be reviewed under the 'highly deferential' standard[.]" U.S. Br. at 121.[5] This argument is consistent with the United States' litigation position in prior Fifth Circuit cases. *See United*

[5] Indeed, the government strongly and explicitly urged the court below *not* to make any independent assessment of the testimony with regard to fundamental ambiguity, citing, *inter alia*, the court's statement in *United States v. Abrams*, 568 F.2d 411, 417 & n.25 (5th Cir. 1978), that "'the applicable standard . . . is not whether we think the evidence sufficient but whether a reasonable jury could so conclude' when viewing the evidence 'in light most favorable to the government.'" U.S. Br. at 122.

States v. Morris, 79 F.3d 409, 411 (5th Cir. 1996) ("the Government . . . argues that fundamental ambiguity involves an issue of factual sufficiency"). The United States' effort to claim that the Fifth Circuit did not mean what it said should therefore be seen for what it is—a transparent and disingenuous effort to evade this Court's review of an issue on which the Fifth Circuit stands alone in refusing to give plenary consideration to fundamental ambiguity claims.

In an effort to reconcile the decision below with the rule in virtually every other circuit that fundamental ambiguity claims are reviewed *de novo*, the government contends that that court below "seemingly" considered Brown's ambiguity claim *de novo*. Opp. 16. Apart from the fact that such an action would have expressly contradicted the court's own statement about the standard of review it was applying, *see supra* p.5, nothing in the referenced discussion suggests any such plenary consideration of the grand jury colloquy. Assessing fundamental ambiguity would have required the court to focus objectively on the words of the questioner and the responses given, and determine whether, in context, the degree of ambiguity is so great as to be "not amenable to jury interpretation." *United States v. Serafini*, 167 F.3d 812, 820 (3d Cir. 1999). This it completely failed to do.

Specifically, in concluding that "a reasonable jury could have found that the evidence was sufficient to conclude that Brown knew that oral agreements had been made and that Brown's answers . . . were untruthful," Pet. App. 31a-32a, the court gave no consideration at all to the ambiguity of either the prosecutor's questions or petitioner's answers concerning what "obligations" or "promises" Brown was addressing. It did not mention the prosecutor's failure to clarify the ambiguity inherent in petitioner's statement that a buy-back "obligation" was "inconsistent with my understanding of what the transaction was." *Id.* at 26a n.15; *see also* Pet. 25. Nor did it discuss the fact that petitioner's other two alleged denials of a "promise" likewise came in response to questions about a document that contained a

"Description of Transaction," which the prosecutor quoted to petitioner as "promising that Merrill would be taken out by sale to another investor by June 2000." Pet. 27. Petitioner's denial of awareness about such a promise in that context is most reasonably understood as a reaffirmation of his prior statements that such promise was contrary to his understanding of the formal transaction. If there was doubt about that, the prosecutor's job was to probe deeper, as *Bronston* requires. But he never did so.

The single paragraph relied on by the government as constituting *de novo* review for fundamental ambiguity begins with the conclusory statement that *Bronston*'s "imperative" of "precise questioning" had been complied with. Pet. App. 32a. This is a remarkable conclusion, given the prosecutor's failure, under the circumstances, even once to ask about an "oral" promise or a promise made outside the transaction documents themselves—the denial of which is the essence of the perjury alleged. In its entirety, the single paragraph then focuses on the absence of any "struggle[] to understand . . . the questions," the "carefully responsive" nature of petitioner's answers," and certain aspects of petitioner's "word choice." *Id.* None of this has anything to do with the matter at issue in a fundamental ambiguity inquiry—whether, in the context of the questions asked and answers given, the testimony is so needlessly uncertain and objectively ambiguous that presentation to a jury of a criminal charge of lying should be foreclosed as a matter of law. Under the law as it has developed in every other circuit, petitioner is entitled to have a court make that determination in the first instance. Certainly no such determination was made by the court below.[6]

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[6] The government's effort to minimize the significance of the Fourth Circuits decisions in this area, Opp. at 18-20, is unavailing. That court has expressly held that "one cannot be found guilty of a false statement

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Given the First Amendment, it is commonplace in our system that when speech rubs up against government actions taken to restrict or penalize it, judges play a heightened role in refereeing any conflict.[7] The Court's decision in *Bronston*, and the legal defenses of literal truth and fundamental ambiguity, are in part expressions of this concern about undue chilling of speech in the context of criminal prosecutions for lying under oath. The unanimous Court made clear its great concern that the enforcement measures taken with regard to perceived false statements not "discourage witnesses from appearing or testifying," 409 U.S. at 359, and found the right balance in the legal defense of literal truth and an "imperative" of "precise questioning," both enforced by plenary court review. *Id.* at 362.

Petitioner testified voluntarily in this case, but reminders abound that the willingness of citizens to provide their information cannot be taken for granted. *See* Dan Eggen, *Aide to Gonzales Won't Testify*, Wash. Post, Mar. 27, 2007,

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. . . when his statement is within a reasonable construction." *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980); *see also United States v. Camper*, 384 F.3d 1073, 1077 (9th Cir. 2004) (stating that *Race* "held that a defendant cannot be convicted . . . for an ambiguous statement.") This view that *any* genuine ambiguity in a charged statement is a legal bar to perjury prosecution is the polar opposite of the Fifth Circuit's view that no level of ambiguity, fundamental or otherwise, raises a legal question requiring *de novo* consideration by the court.

[7] *See, e.g., Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 619, 621 (2003) (upholding civil fraud action against First Amendment challenge based in part on provision for independent appellate review of trial court clear and convincing evidence findings); *Bose Corp. v. Consumer's Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (in context of product disparagement suit, requiring appellate court to make "independent examination of the whole record" to ensure there is no "forbidden intrusion on the field of free expression"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964) (same in context of libel action).

at A3. Even the honest and upright can be discouraged from stepping forward if prosecutors are allowed to abuse witnesses by fishing for arguable contradictions with vague and repetitious questions that never get to any clear and understandable point, and then prosecuting for lying based on strained constructions of the responses.

These concerns are especially acute in the intimidating context of the federal grand jury, where the prosecutor holds all the cards and completely controls the questioning, and the witness is denied ready access to the advice of counsel. *See* Amicus Br. of NACDL at 8-11. They are aggravated further by the fact that perjury is a crime not against any individual, but against the system, in which the U.S. Attorney controlling the grand jury is also the one who decides whether to indict on a dubious allegation of lying under oath. And that decision was surely influenced here by the "hanging" atmosphere in Houston in the wake of the Enron collapse.

On these facts, if the prosecutor wished to charge petitioner with "stating that he did not know of any *oral promise* between Enron and Merrill Lynch relating to the barge transaction," Indictment ¶ 18 (emphasis added), he was required to ask a question that was understandable in making that point. Failing that, it was the duty of the Fifth Circuit to set the conviction aside, because read in context, petitioner's charged statements were either literally true, fundamentally ambiguous, or both. But the Fifth Circuit declines to play the gatekeeper role assigned in *Bronston* and recognized by every other circuit. And it specifically refused petitioner's requests to do so here. That grave dereliction of duty merits the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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